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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/624,154	07/24/2000	Peter Godlewski	16166-001800US	5073

20350 7590 08/14/2003

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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 08/14/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/624,154

Applicant(s)

GODLEWSKI ET AL.

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 30 July 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 and 31-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 and 31-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

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DETAILED ACTION

Acknowledgments

1. The Request for Reconsideration (Paper No. 15) after the first Final Rejection is again acknowledged. An Advisory Action followed (Paper No. 16). Applicants' Notice of Appeal (Paper No. 18) is also acknowledged.
2. Because the Examiner failed to include a Response to Arguments' section, the finality of the previous Office Action (Paper No. 14) is hereby withdrawn. An action on the merits follows. Accordingly, claims 1-15 and 31-35 remain pending.

Restriction & Election of Species

3. Applicants' election without traverse of Invention I (claims 1-15 and 31-35) in Paper No. 8 is acknowledged.
4. Applicants' election without traverse of Species I represented by figure 1 (claims 1-15 and 31-35) in Paper No. 8 is also acknowledged.

Drawings

5. The proposed drawing correction and/or the proposed substitute sheets of drawings, filed on January 6, 2003 (Paper No. 13) have been approved by the Examiner.

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Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the Applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the Applicant for patent.

7. Claims 1, 3, and 31-34 are rejected under 35 U.S.C. 102(e) as being anticipated by Sone (U.S. 6,204,763 B1, hereinafter "Sone"). Sone discloses the following: providing a plurality of dispensing units (storage receptacle 11) that each hold a plurality of each of multiple distinct items (e.g. milk, toilet paper, paper towels, and canned food as showing in figure 2), the units have processor and memory (inherent in computer 26); periodically sending restocking information from the dispensing units (an item is added to the list after its been in the refrigerator for a predetermined length of time or an order is triggered if the quantity is below a predetermined threshold) over a network to a server computer (24) wherein the restocking information includes restock quantity for each item (inherent); aggregating the restock quantities over the plurality of dispensing units for each of the multiple distinct items (occurs on the user's bill, e.g. if milk was delivered twice, the user would have milk delivery twice on their bill; alternatively, the four (4) toilet paper rolls as shown in figure 2); generating the ordering information (quantity to be ordered) based on the aggregate restocking information (the 4 rolls of toilet paper; its impractical

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to supply a single roll); electronically sending the ordering information to one or more supplier computers to order items to be restocked within the dispensing units (inherent); generating ordering information (for vendor purposes) *using* the sever computer (without the server computer, the vendors would not have ordering information to fill the order); determining supplier information (which supplier or vendor furnishes a given product); accessing the hosted procurement application (the computer program running on computer 26) to view the ordering information on a display screen of a user computer (touch screen, see column 5, ~lines 62+) with ordering pages (inherent); the information is sent to a business portal computer (inherent in the multiple vendors) using a purchase order number (inherent in the order number); sending advance shipping notice (e.g. requesting delivery of milk on ever Saturday afternoon); confirmation of the received items is sent from the dispensing units (inherent in the user's payment; if the user never received an item, the user would not pay for that item just as a credit card purchaser may challenge an item on their bill if they never received possession of the item); an electronic invoice is sent (inherent since how else would the household's purchases be tracked and billed?).

8. It is the Examiner's principle position that Sone inherently discloses a method for supplying items in a plurality of homes (or households).

a. Because Sone discusses prior art systems in "commercial establishments" yet not appreciated in the home environment (column 2, ~ lines 8-13), Sone inherently discloses the use of the system in a plurality of homes. Additionally evidence of the inherency is that it would be impractical for a vendor to provide the service to a single home.

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b. Moreover, Sone column 2, ~ lines 33-35 states, "More particularly, the present invention comprises *a household* consumable item automatic replenishment system and method . . . [Emphasis added.]" "It is well settled that the term 'a' or 'an' ordinarily means one or more." *Tate Access Floors Inc. v. Interface Architectural Resources Inc.*, 279 F.3d 1357, 1370, 61 USPQ2d 1647, 1657 (Fed. Cir. 2002). Therefore, "a household" noted above is interpreted to mean one or more households.

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 1, 3, and 31-34 are alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Sone.¹ It is the Examiner's principle position that use of the automatic replenishment system in multiple homes (or households) is inherent in Sone and therefore anticipated as noted above.

Alternatively, if not inherent, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Sone to include the system in multiple

¹ See MPEP §2112 expressly authorizing alternative 102/103 rejections when the question of inherency is present in the §102 rejection.

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homes. Such a modification would have made system profitable for the vendors and delivery persons since they would never make money if the system was for a single home.

Furthermore, the placement of the automatic replenishment system in multiple homes is merely duplicating an easily delineated and expressly described embodiment in Sone. Mere duplication of parts has no patentable significance unless a new and unexpected result is produced. See MPEP §2144.04 VI *B* or *In re Harza*, 47 CCPA 771, 274 F.2d 669, 124 USPQ 378 (CCPA 1960).

11. Claims 2, 4-15, and 35 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Sone in view of Salvo et. al. (U.S. 6,341,271) (“Salvo”). Sone discloses as discussed above but does not directly disclose receiving the request *using the server computer* to obtain the quantities of items to be restocked. Additionally, Sone does not disclose much in terms of the vendor side of the operations in the disclosed system.

Salvo directly teaches initiating the request by the vendor (vendor managed inventory). Salvo’s vendor managed inventory system has the vendor initiating the request (column 9, ~ lines 37-65); generating payment (at 155); and permitting manual selection of suppliers and manufactures. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Sone as taught by Salvo and include various aspects of Salvo’s vendor managed inventory system to the vendor side of Sone. In particular, this would include Salvo’s vendor management tools (some of which are noted above in the cited passage).

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Such a modification would have further reduced delays, costs of ordering, and inventory turn around times.

Additionally, the modification would have helped synchronize inventory ordering and delivery so that food-related items are not out of stock in the home and that perishable goods spend as little as time as possible in transit. For example, suppose milk inventory becomes low in a particular home every Saturday morning because children in the home are having cereal with milk while watching cartoons. Using the vendor's historical trend analysis tool as implemented in Salvo, automatic ordering and subsequent delivery of milk could occur every Saturday afternoon.

12. Claims 1-15 and 31-35 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Higham et. al. (WO 97/14104) ("Higham '104") in view of Sone and Salvo. Higham '104 discloses the claimed invention but does not disclose the computer system needed for automatic ordering and replenishment of products.

Sone discloses as discussed above including a computer system for the automatic ordering and replenishment of products. Sone however does not directly disclose receiving the request using the server computer to obtain the quantities of items to be restocked and does not disclose much in terms of the vendor side of the operations in the disclosed system.

Salvo directly teaches initiating the request by the vendor (vendor managed inventory). Salvo's vendor managed inventory system has the vendor initiating the request (column 9, ~ lines 37-65); generating payment (at 155); and permitting manual selection of suppliers and manufactures. Therefore, it would have been obvious to one having ordinary skill in the art at the

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time the invention was made to modify Higham '104 as taught by Sone and Salvo and include Sone's monitoring system and Salvo's vender side operations. In particular, this would include Salvo's vendor management tools (some of which are noted above in the cited passage). Such a modification would have better automated replenishment of Higham '104's cabinet.

13. For due process purposes, the Examiner again confirms that Applicants have decided not to be their own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustom meanings. To support this position, the Examiner again notes the following factual findings as first expounded in the previous Office Actions.² First, the Examiner has again carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only have Applicants not pointed to definitional statements in their specification or prosecution history, Applicants have also not pointed to a term or terms in a claim with which to draw in those statements.³ Third, after receiving express notice of the Examiner's position that lexicography was *not* invoked,⁴

²See the Examiner's initial Office Action on the merits mailed September 5, 2002, Paper No. 9, Paragraph No. 12; and the previous Office Action on the merits mailed March 31, 2003, Paper No. 14, Paragraph No. 11.

³ "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements." *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

⁴See again the Examiner's initial Office Action on the merits, Paper No. 9, Paragraph No. 12.

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Applicants' first response, (i.e. Paper No. 12) did not point out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicants did not argue lexicography *is* invoked). Forth and to be sure of Applicants' intent, the Examiner also notes that Applicants have declined the Examiner's express invitation⁵ to be their own lexicographer.⁶ Finally, after receiving express notice of the preceding factual findings and conclusions, Applicants' latest response (i.e. Applicants' After Final submission, Paper No. 15) again fails to point out the supposed errors in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b). Moreover, Applicants' latest response—while fully considered by the Examiner—does not change the Examiner's conclusion that Applicants have decided not to be their own lexicographer. Therefore, the heavy presumption in favor of the ordinary and accustomed meaning for claim terminology is confirmed. Accordingly, the claims continue to be interpreted with their "broadest reasonable interpretation," *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997),⁷ and the Examiner

⁵ Id.

⁶ The Examiner's requirements on this matter were reasonable on at least two separate and independent grounds. First, the Examiner's requirements were simply an express request for clarification of how Applicants intend their claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicants was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed August 8, 2003).

⁷ See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) ("In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim

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continues to rely heavily and extensively on this interpretation.⁸ Unless expressly noted otherwise by the Examiner, the preceding claim interpretation principles in this paragraph apply to all examined claims currently pending.

14. To the extent the Examiner's claim interpretations are different from or in dispute with Applicants' interpretations, the Examiner hereby adopts the following definitions in all his claim interpretations. Additionally, the following list is not an exhaustive list of claim interpretations. Therefore, under the broadest reasonable interpretation standard and in accordance with *In re Morris*, the Examiner relies on the following definitions:

a. **Server:** "2. On the Internet or other network, a computer or program that responds to commands from a client." Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997.⁹ **Client:** "3. On a local area network or Internet, a computer that accesses shared network resources provided by another computer (called a *server*)." *Id.* **Computer:** "Any

language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification."); MPEP §§ 2111 and 2111.01; and *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

⁸ See 37 C.F.R. §1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]"

⁹ The Examiner finds that the Microsoft Press's *Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See e.g. *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used *Microsoft Press Computer Dictionary* (3d ed.) as "a technical dictionary" used to define the term "flag."

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machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” *Id.*

b. **Internet** “The worldwide collection of networks and gateways that use the TCP/IP suite of protocols to communicate with one another. At the heart of the Internet is a backbone of high-speed data communication lines between major nodes or host computers, consisting of thousands of commercial, government, educational, and other computer systems, that route data and messages.” *Id.*

c. **Data** “Plural of the Latin *datum*, meaning an item of information. In practice, data is often used for the singular as well as plural the form of the noun.” *Id.*

d. **Electronic** “2 : of, relating to, or utilizing devices constructed or working by the method or principles of electronics; also : implemented on or by means of a computer <~ food stamps> <~ banking>” *Id.*

e. **Aggregate** “2 : the whole sum or amount : SUM TOTAL” Merriam-Webster’s Collegiate Dictionary, 10th Edition, Merriam-Webster Inc., Springfield, M.A., 1997.

f. **Confirmation** “2 . . . b : the process of supporting a statement by evidence” *Id.*

g. **Information** “ 2 a . . . (3): FACTS, DATA . . . ” *Id.*

h. **Receipt** “a writing acknowledging the receiving of goods or money.” *Id.*

i. **Unit** “3 a : a single thing, person, or group that is a constituent of a whole” *Id.*

15. Functional recitations using the word “for” and “to” (e.g. “for supplying items to a plurality of dispensing units” as recited in claim 1 and “to permit” as recited in claim 33) have been given

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less patentable weight because they fail to add any steps and are thereby regarded as intended use language. A recitation of the intended use of the claimed invention must result in additional steps. See *Bristol-Myers Squibb Co. v. Ben Venue Laboratories, Inc.*, 246 F.3d 1368, 1375-76, 58 USPQ2d 1508, 1513 (Fed. Cir. 2001) (Where the language in a method claim states only a purpose and intended result, the expression does not result in a manipulative difference in the steps of the claim.).

16. It is the Examiner's factual determination that all claimed limitations in the examined claims have been considered and are either disclosed or inherent in the references as discussed above. Furthermore, the inherent features are established by a preponderance of the evidence. *In re Epstein*, 32 F.3d 1559, 1564, 31 USPQ2d 1817, 1820 (Fed. Cir. 1994) ("Preponderance of the evidence is the standard that must be met by the PTO in making rejections." (citations and quotations omitted)). The preceding discussion regarding the standard for claim rejections applies to all examined claims currently pending.

Response to Arguments

17. Applicants' arguments filed January 6, 2003 (Paper No. 12) and June 6, 2003 (Paper No. 15) have been fully considered but they are not persuasive.

18. Applicants argue that "no prima facie case has been established at least because their is no disclosure of Sone of the claim limitations of 'aggregating the restock quantities over the plurality

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of the dispensing units for each of the multiple distinct items'"¹⁰ The Examiner respectfully disagrees. Vendors total the quantities of items sold for many reasons, the least of which is for tax and reporting purposes.

19. Moreover, the Examiner disagrees with Applicants' statement that "Salvo even fails to contemplate that restock quantities could be available for multiple distinct items in a plurality of dispensing units."¹¹ "The law is clear that patent documents need not include subject matter that is known in the field of the invention and is in the prior art, for patents are written for persons experienced in the field of the invention. . . . To hold otherwise would require every patent document to include a technical treatise for the unskilled reader." *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1371, 59 USPQ2d 1745, 1749-50 (Fed. Cir. 2001) citing *Vivid Technologies, Inc. v. American Science and Engineering, Inc.*, 200 F.3d 795, 804, 53 USPQ2d 1289, 1295 (Fed. Cir. 1999) ("patents are written by and for skilled artisans").

Evidence to support the Examiner's position that vendors aggregate restock quantities includes the fact that vendors have more than one customer for a given product. Moreover, Salvo directly discloses multiple vendors. See column 10, lines 62 through column 11, lines 1-17.

20. Furthermore, while the Examiner agrees with Applicant's test for inherency, (i.e. that for inherency, the missing elements must be present in present in the embodiment in the reference), such inherency is established by a preponderance of the evidence. In this case, the Examiner has

¹⁰ See Applicants' Remarks, Paper No. 12, page 10

¹¹ See Applicants' Remarks, Paper No. 12, pages 10-11.

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provided evidence to support his position and thus established a prima facie case of anticipation and/or obviousness. Applicants have not successfully overcome the prima facie case.

21. Applicant also state that “the Office Action provides not basis for its assertion that the limitation is inherent” The Examiner respectfully disagrees. The dispensing units in Salvo have sensors, if material is received, it inventory (i.e. receipt) is directly sent to the controller (114).

22. Because Salvo directly tracks and controls the inventory with GPS, it must confirm receipt of the delivered products. How else would the control center know if a product was delivered? Applicants should be able to discern from Salvo the necessity for confirmation because Salvo tracks all inventory. When tracking inventory, it is highly desirable to know if the inventory arrived at its destination.

23. Applicants’ attempt at traversing the Official Notice findings as stated in the initial Office Action on the merits (Paper No. 9, Paragraph Nos. 16-18) is inadequate. Adequate traversal is a two step process. First, Applicants must state their traversal on the record. Second and in accordance with 37 C.F.R. § 1.111(b) which requires Applicants to specifically point out the supposed errors in the Office Action, Applicants must state *why* the Official Notice statement(s) are not to be considered common knowledge or well known in the art.

In this application, while Applicants have clearly met step (1), Applicants have failed step (2) since they have failed to argue *why* the Official Notice statements are not to be considered

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common knowledge or well known in the art. Because Applicants' traversal is inadequate, the Official Notice statements are taken to be admitted as prior art. See MPEP §2144.03.

24. Moreover, the Examiner had taken Official Notice of a particular fact. Applicants' statement that the Official Notice "ignores the part of the limitation that the confirmation receipt be sent from the dispensing units"¹² is not a challenge to the veracity of the Official Notice statement itself. Applicants' statement appears to a challenge to the Examiner's choice of *which particular* fact(s) the Examiner had taken Official Notice of, rather than a challenge to the veracity of the statement itself.

25. Finally, it is the Examiner position that inherency and Official Notice are two separate and distinct concepts. In this application, the Examiner started with inherency arguments. If a reviewing body finds that the elements are not inherent, the Examiner has relied on Official Notice to provide the factual basis of an obviousness rejection.

Conclusion

26. Applicants' amendment (Paper No. 12) necessitated the new grounds of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP §706.07(a). Applicants are reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

¹² See Applicants' Remarks, Paper No. 12, page 11, ~ lines 17-19.

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

27. The prior art made of record considered pertinent to Applicants' disclosure includes the following: Sokol, Phyllis K., EDI: The Competitive Edge for basic EDI concepts; Poirier, Charles C. et. al. , E-Supply Chain for electronic commerce concepts, procedures, and other topics; and Horngren, Charles T., et. al., Introduction to Financial Accounting, Revised 3rd Ed., Chapters 1-7, for old and well known accounting practices.

28. Unless expressly noted otherwise by the Examiner, the following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8th Edition, Rev 1, February 2003. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

29. Because this application is now final, Applicants are reminded of the USPTO's after final practice as discussed in MPEP §714.12 and §714.13 and that entry of amendments after final is *not* a matter of right. "The refusal of an examiner to enter an amendment after final rejection of

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claims is a matter of discretion.” *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted). Furthermore, suggestions or examples of claim language provided by the Examiner are just that—suggestions or examples—and do not constitute a formal requirement mandated by the Examiner. Unless stated otherwise by an express indication that the claim is “allowed,” exemplary claim language provided by the Examiner to overcome a particular rejection or to change claim interpretation has *not been addressed* with respect to other aspects of patentability (e.g. §101 patentable subject matter, §112 1st paragraph written description and enablement, §112 2nd paragraph antecedent basis and indefiniteness, and §102 and §103 prior art). Therefore, any claim amendment submitted under 37 C.F.R. §1.116 that incorporates an Examiner suggestion or example or simply changes claim interpretation will nevertheless require further consideration and/or search and a patentability determination as described above.

30. In accordance with *In re Lee*, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the references How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla are additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Each reference is cited in its entirety. Moreover, because the references are directed towards beginners (see “User Level: Beginning . . .”), the Examiner finds that the references are primarily directed towards those of *low* skill in this art. Because the references are directed towards those of low skill in this art, the Examiner finds

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that one of *ordinary* skill in this art must—at the very least—be aware of the knowledge and information contained within the references.

31. All factual findings and conclusions of law in this Office Action are based the entire record. Although the Examiner may have singled out various items of evidence (e.g. Sone or Salvo) and expressly noted their content, this does *not* mean that the other documents of record were not considered and applied when making the prior art rejections above. Moreover, because the cannons of claim construction are generally viewed from a person of ordinary skill in the art,¹³ the other documents of record not specifically mentioned in the prior art rejections above were used in the Examiner's deliberative process to access, inter alia, the definiteness of the claims, the level of skill in the art, and ultimately the patentability of the claimed invention.

32. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicants for their "Remarks" (Paper No. 12, pages 9-12) traversing the Examiner's positions on various points. If Applicants disagree with any additional factual determination or legal conclusion made by the

¹³ See e.g. *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1986)(noting that the definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim).

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Examiner in this Office Action whether expressly stated or implied¹⁴, the Examiner respectfully requests Applicants *in their next properly filed response* to expressly traverse the Examiner's position and provide appropriate arguments in support thereof. By addressing these issues now, matters where the Examiner and Applicants agree can be eliminated allowing the Examiner and Applicants to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicants have *any* questions regarding the Examiner's positions or have other questions regarding this communication or even previous communications, Applicants are strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292.



Andrew J. Fischer
Patent Examiner



MICHAEL CUFF
PRIMARY EXAMINER

AJF
August 8, 2003

¹⁴ E.g., if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.